

**In The United States Patent and Trademark Office
On Appeal From The Examiner To The Board
of Patent Appeals and Interferences**

In re application of: Gary L. Sextro et al.
Serial No.: 09/829,468
Filing Date: April 9, 2001
Confirmation No. 8685
Art Unit: 2612
Examiner: Shirley Lu
Title: FEATURES FOR INTERACTIVE TELEVISION

Mail Stop Appeal Brief - Patents

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Appeal Brief

Appellants have appealed to the Board of Patent Appeals and Interferences ("Board") from the decision of the Examiner mailed September 5, 2007, finally rejecting pending Claims 1, 2, 4-18, 24 and 25. An Advisory Action was mailed November 29, 2007. Appellants filed a Notice of Appeal April 9, 2001. Appellants respectfully submit this Appeal Brief with the statutory fee of \$510.00.

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Real Party-In-Interest

The real party-in-interest for this Application is Texas Instruments Incorporated, a Texas corporation, by virtue of a chain of title from the inventor to the current assignee, as shown below:

1. From: Gary L. Sextro
 John R. Reder
 Roger S. Carver
 Timothy L. Ryan
 James F. Headley
 Anna Antoszkiewicz

 To: Texas Instruments Incorporated
 Assignment recorded at Reel 011984, Frame 0676,
 on July 16, 2001

Related Appeals and Interferences

The Appellants filed a prior Appeal Brief on January 19, 2007, which addresses claim rejections based on the same *Ellis-Smallcomb-Butler* combination currently at issue. The Appellants, the undersigned Attorney for Appellants, and the Assignees know of no other applications on appeal that may directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

Status of Claims

Claims 1, 2, 4-18, 24 and 25 were rejected in the final Office Action mailed September 5, 2007 (the “Final Office Action”). Appellants present Claims 1, 2, 4-18, 24 and 25 for appeal and set forth these claims in Appendix A.

Status of Amendments

All amendments submitted by Appellants were entered by the Examiner prior to the mailing of the Advisory Action mailed November 29, 2007.

Summary of Claimed Subject Matter

With regard to the claims currently under Appeal, Appellants provide the following concise explanation of the subject matter recited in the claim elements. For brevity, *Appellants do not necessarily identify every portion of the Specification and drawings relevant to the recited claim elements*. Additionally, this explanation should not be used to limit Appellants' claims but is intended to assist the Board in considering the Appeal of this Application.

In accordance with the teachings of the present disclosure, methods and systems for interactive television are provided. (Figures 1-2, Table 1, and Page 4, Line 8 through Page 7, line 10 provide a concise explanation of the subject matter recited in independent Claims 1, 6, 11, 17, and 18). The process described in Claims 1, 6, and 17 receives a terrestrial broadcast (*e.g.*, 100/301) comprising a video stream with embedded commands (*e.g.*, Page 7, Lines 1-5). (Claim 11 recites providing a broadcast signal (*e.g.*, 100/301) comprising a video stream and embedding commands in the video stream.) The embedded commands are interpreted (*e.g.*, Page 5, Lines 12-14), are operable to access interactive features (*e.g.*, Page 5, Lines 14-17), and are synchronized with additional content provided via the internet (*e.g.* Page 10, Lines 15-22). Internet content is received via satellite transmission and internet communications are transmitted via landline (*e.g.*, Table 1). The additional Internet-based content is displayed superimposed on the video stream from the traditional broadcast signal (*e.g.*, Page 5, Lines 12-14).

Claim 6 further recites embedding delimiters to define sequential video clips for storage and future display (*e.g.*, Page 20, Lines 21-22). The sequential video clips comprise a segment of a sporting event (*e.g.*, Page 10, Line 22-23). One or more of the video clips of selected plays are stored (*e.g.*, Page 10, Line 22 through Page 11 Line 1). The stored video clips are summarized with a graphic summary including coded indicators denoting types of plays (*e.g.*, Page 11, Lines 1-8) One of the video clips are replayed upon viewer selection of a corresponding coded indicator (*e.g.*, Page 10, Line 22 through Page 11 Line 1).

As recited in Claim 11, access to Internet sites, which offer pushed products that are selected using analysis of the viewer's habits, are prompted by embedding commands in the video stream (*e.g.*, Page 7, Lines 14-16; and Page 9, Lines 14-16).

The process described in Claims 1 and 11 also provides a digital interactive set-top box coupled to a standard television (*e.g.*, Figures 2-3, references 200, 210, 211, 309, and 310; Page 5, Lines 19-20). The interactive set-top box accesses the additional Internet-based content and superimposes the content on the video stream (*e.g.*, Figure 2-3; Page 5, Lines 20-22).

Claim 17 further recites providing taskbars displaying various accounts in the home (*e.g.*, Page 7, Lines 11-12).

The interactive television system of Claim 18 includes a broadcast video receiver for receiving video data (*e.g.*, Page 7, Lines 1-5). A digital interactive set-top box is coupled to a standard television and accesses Internet-based content and the content on the video data (*e.g.*, Figure 2-3, references 200, 210, 211, 309, and 310; Page 5, Lines 19-20). The digital interactive set-top box includes an internet browser, a graphics processor, and a viewer interface (*e.g.*, Figure 1, references 103, 107 and 108; Page 5, Lines 12-15). The internet browser provides bi-directional access to internet content, receives the internet content via satellite transmission, and sends the internet content via landline transmission (*e.g.*, Table 1; Page 5, Lines 9-12). The graphics processor is capable of receiving the broadcast video content and the internet content and providing combined video data comprised of both broadcast video content and internet content (*e.g.*, Page 5, Lines 12-14). The viewer interface interprets viewer input and sends corresponding data content through the internet browser to a third party (*e.g.*, Page 5, Lines 14-17). A display is in communication with the graphics processor for displaying the combined video data (*e.g.*, Page 5, Lines 12-14).

Grounds of Rejection to be Reviewed on Appeal

Are Claims 1, 2, 4-18, 24 and 25 patentable over U.S. Application Pub. No. 2004/0117831 filed by Ellis et al. ("*Ellis*") in view of U.S. Patent No. 5,938,737 to Smallcomb et al. ("*Smallcomb*") and U.S. Application Pub. No. 2002/0007493 filed by Butler et al. ("*Butler*") under 35 U.S.C. § 103(a)?

Argument

For at least the following reasons, the Examiner's rejections of Claims 1, 2, 4-18, 24 and 25 are improper and should be reversed.

I. The Pending Claims are Allowable Over the Proposed *Ellis-Smallcomb-Butler* Combination

A. Overview

In the Final Office Action, the Examiner rejected Claims 1, 4-10, 12-13, 15-17, and 24-25 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Application Pub. No. 2004/0117831 filed by Ellis et al. ("*Ellis*") in view of U.S. Patent No. 5,938,737 to Smallcomb et al. ("*Smallcomb*"). The Examiner rejected Claims 2 and 14 under 35 U.S.C. § 103(a) as being unpatentable over *Ellis* in view of *Smallcomb*, and in view of U.S. Application Pub. No. 2002/0007493 filed by Butler et al. ("*Butler*"). The Examiner rejected Claim 18 under 35 U.S.C. § 103(a) as being unpatentable over *Butler* in view of *Smallcomb* and in view of *Ellis*. The Examiner rejected Claim 11 under 35 U.S.C. § 103(a) as being unpatentable over *Butler* in view of *Ellis*.

Appellant respectfully disagrees with the Examiner and submits that the rejection of Claims 1, 4-10, 12-13, 15-17, and 24-25 based on the teachings of *Ellis*, *Smallcomb*, and *Butler* is improper.

B. Standard

The question raised under 35 U.S.C. § 103 is whether the prior art taken as a whole would suggest the claimed invention taken as a whole to one of ordinary skill in the art at the time of the invention. "To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. All words in a claim must be considered in judging the patentability of that claim against the prior art." M.P.E.P. § 2143.03 (citations omitted).

The controlling case law, rules, and guidelines repeatedly warn against using an applicant's disclosure as a blueprint to reconstruct the claimed invention. For example, the

M.P.E.P. states, “The tendency to resort to ‘hindsight’ based upon applicant’s disclosure is often difficult to avoid due to the very nature of the examination process. However, impermissible hindsight must be avoided and the legal conclusion must be reached on the basis of the facts gleaned from the prior art.” M.P.E.P. § 2142.

Furthermore, when the prior art teaches away from combining certain known elements, discovery of a successful means of combining them is more likely to be nonobvious. *KSR*, 127 S.Ct at 1739; *see also* M.P.E.P. § 2143.03 (“If [the] proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification.” (citing *In re Gordon*, 733 F.2d 900 (Fed. Cir. 1984))).

C. Reliance on the *Ellis* Reference is Misplaced

The Final Office Action relies on at least U.S. Patent Application Publication No. 2004/0117831 A1 to *Ellis et al.* (“*Ellis*”) to reject all of the pending claims. The use of *Ellis*, however, is improper. *Ellis* is a continuation of U.S. Application No. 09/604,470 filed June 26, 2000. *Ellis* also claims priority to Provisional Application No. 60/141,501 Application No. 60/141,501 (“*Ellis Provisional*”) filed June 28, 1999. Appellants have a filing date of April 9, 2001. Additionally, Appellants further claim priority to Appellants’ Provisional Application filed April 8, 2000, which fully supports the present claims. As a result, Appellants respectfully submit that in order to utilize *Ellis*, the Examiner **must** rely on the June 28, 1999 filing date of the *Ellis Provisional*.

The filing date of the *Ellis Provisional* only applies to *Ellis*, however, “**if** the [*Ellis Provisional*] properly supports the subject matter relied upon to make the rejection in compliance with 35 U.S.C 112, first paragraph.” *See* M.P.E.P. § 2136.03(III) (**emphasis in original**); *see also* M.P.E.P. § 706.02(f)(1) (stating that the filing date of a provisional application may be relied upon only **if** the provisional application “properly supports the subject matter used to make the rejection in compliance with 35 U.S.C. 112, first paragraph”). In addition, Appellants respectfully refer the Examiner to the second example following M.P.E.P. § 706.02(f)(1), which explains 35 U.S.C. § 119(e) **requires** “a prior U.S. provisional application . . . [to have] proper support for the subject matter” of a reference in

order for the subject matter to be reference-effective as of the provisional filing date. *See* M.P.E.P. § 706.02(f)(1), example 2.

The allocation of burdens requires that the USPTO produce the factual basis for its rejection of an application under 35 U.S.C. §§ 102 and 103. *In re Piasecki*, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984) (citing *In re Warner*, 379 F.2d 1011, 1016, 154 USPQ 173, 177 (CCPA 1967)). The one who bears the initial burden of presenting a *prima facie* case of unpatentability is the Examiner. *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). The Examiner thus carries the burden of establishing that the conditions set forth in M.P.E.P. §§ 2136.03(III) and 706.02(f)(1) are met. *See In re Wertheim*, 646 F.2d 527, 531-39, 209 USPQ 554, 559-66 (CCPA 1981) (holding that “[i]f, for example, the PTO wishes to utilize against an applicant a part of that patent disclosure found in an application filed earlier than the date of the application which became the patent, **it must demonstrate** that the earlier-filed application contains §§ 120/112 support for the invention claimed in the reference patent.”) (emphasis added).

Contrary to the applicable law and the above referenced M.P.E.P. sections, the Examiner suggested during a phone interview on November 1, 2007, that Appellants have the burden to show that the *Ellis Provisional* fails to properly support the subject matter relied upon to make a rejection in compliance with 35 U.S.C. § 112, first paragraph. Although Appellants respectfully traverse for at least the reasons stated above, Appellants nevertheless previously argued in Appellants’ Response filed July 17, 2007, that the *Ellis Provisional* fails to properly support the subject matter relied upon by the Office Action to make its rejections. (Pages 11-12.). Appellants reiterated these arguments in Appellants’ Response filed November 5, 2007. (Pages 10-11). In addition, Appellants previously argued that the *Ellis Provisional* fails to anticipate each and every limitation of Appellants’ claims. Appellants note that both the Final Office Action and the Advisory Action fail to specifically address these previously asserted arguments. For the convenience of the Board, the Applicant summarizes the same arguments in Section D below.

In response to Applicant’s arguments regarding the use of *Ellis* to reject Appellants claims, the Advisory Action merely cites the *Ellis Provisional* “starting at page 8” and a

second reference “60/093,865 starting at page 2” for the proposition that the *Ellis Provisional* discloses the limitations of Claims 1, 6, and 17. Notably, the Advisory Action fails to assert the *Ellis provisional* also discloses the limitations of independent Claims 11 and 18 and the claims depending respectively therefrom. Moreover, the reliance on unnamed reference 60/093,865 is misplaced because the Examiner fails to identify any particular portion of the reference that the Examiner contends provides support for the claimed subject matter other than implying such support is not found on page 1. Indeed, the examiner does not even provide a copy of that provisional.

D. The Proposed *Ellis-Smallcomb-Butler* Combination Fails to Disclose, Teach, or Suggest Limitations Recited in the Claims

Appellant respectfully submits that the Examiner’s rejection fails to establish a *prima facie* case for obviousness at least because the proposed combination of *Ellis* with *Smallcomb* fails to disclose, teach, or suggest elements specifically recited in Claim 1.

As one example, the proposed *Ellis-Smallcomb* combination fails to disclose, teach, or suggest “providing a digital interactive set-top box coupled to a standard television, said interactive set-top box accessing said additional Internet-based content and superimposing said content on said video stream.” The Final Office Action relies on a set-top box 26 of *Ellis* at Paragraph 0098 to disclose each of the above limitations. (Page 3.). Whether or not this is correct, *Ellis* was filed after Appellants’ priority date and cannot be used as a reference against Appellants’ Application unless support exists for all alleged limitations in the *Ellis Provisional*—it does not. The Advisory Action failed to indicate what specific portion of the *Ellis Provisional* it contends meets this limitation. It could not because there is none. As a result, the *Ellis Provisional* fails to disclose “providing a digital interactive set-top box coupled to a standard television, said interactive set-top box accessing said additional Internet-based content and superimposing said content on said video stream” of Independent Claim 1, as required by the M.P.E.P.

For at least this reason, Independent Claim 1 is allowable, as are Claims 2, 4-5, 8-10, 12-16, and 24-25 that depend therefrom. For analogous reasons, Independent Claims 11 and 18 are allowable. Reconsideration and favorable action are requested.

Claim 6 is allowable at least because the *Ellis Provisional* fails to disclose, expressly or inherently, “storing one or more of said video clips of said selected plays; summarizing said stored video clips with a graphic summary including coded indicators denoting types of plays; replaying one of said video clips upon viewer selection of a corresponding said coded indicator.” The Final Office Action relies on claim 5 and Paragraphs 0018, 0169, and 0184 of *Ellis* to disclose this limitation. (Page 5.). The *Ellis Provisional*, however, not only fails to disclose “one or more of said video clips of selected plays,” but also fails to disclose “summarizing said stored video clips with a graphic summary including indicators denoting types of plays” of Independent Claim 6, as required by the M.P.E.P.

For at least this reason, Independent Claim 6 is allowable, as is Claim 7 that depends therefrom. For analogous reasons, dependent Claim 24 is allowable. Reconsideration and favorable action are requested.

Independent Claim 17 is allowable at least because the *Ellis Provisional* fails to disclose, expressly or inherently, “providing taskbars displaying various accounts in the home.” The Final Office Action relies on a user profile of *Ellis* at Paragraph 0202 and claim 11 of *Ellis* to disclose this limitation. (Page 10.). The *Ellis Provisional*, however, fails to disclose the user profile of *Ellis*. In fact, it also clearly teaches away from a user profile, as described below:

Unlike user-preference-based guides, there is no mode. When one viewer in a household is done making selections, the guide is not left in a state with that viewer's preferences still intact. There is no need to "log in" and tell the system who is watching television.

See Ellis Provisional, Page 2 (emphasis added). As a result, the *Ellis Provisional* fails to disclose "providing taskbars displaying various accounts in the home" of Claim 17, as required by the M.P.E.P.

For at least this reason, Independent Claim 17 is allowable. For analogous reasons, dependent Claim 25 is allowable. Reconsideration and favorable action are requested.

E. The Examiner has Relies on Inconsistent Arguments

Appellants note that Appellants' Appeal Brief filed January 19, 2007 addresses claim rejections based on the same *Ellis-Smallcomb-Butler* combination (*See* Pages 3 and 6) and that the Examiner now relies on arguments that are inconsistent with those made by the Examiner prior to the first appeal. For example, the Office Action dated April 19, 2006 concedes, "*Butler* fails to specifically teach, said embedded commands synchronized and correlated with additional Internet-based content." (Page 7.) However, in the Office Action dated April 17, 2007 the Examiner relies on paragraphs 0015 and 0051 of *Butler* to teach this limitation of independent Claims 1, 6, 11 and 17, despite the previous concession to the contrary. (*See* Page 3.).

Similarly, the Office Action dated April 19, 2006 concedes, "*Ellis* fails to specifically teach, said embedded commands synchronized and correlated with additional Internet-based content." (*See* Page 16.) However, in the Office Action dated April 17, 2007 the Examiner relies on paragraphs 0091 and 0183 of *Ellis* to teach this limitation of independent Claims 1, 6, 11 and 17, despite the previous concession to the contrary.

Conclusion

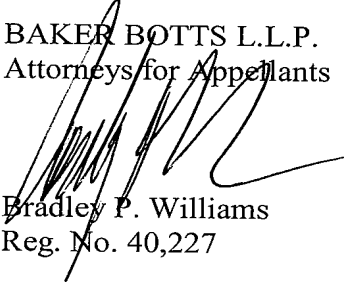
Appellants have demonstrated that, for at least the foregoing reasons, the present invention, as claimed, is clearly patentable over the references cited by the Examiner. Therefore, Appellants respectfully request the Board to reverse the final rejection of the Examiner and instruct the Examiner to issue a Notice of Allowance of all pending claims.

The Commissioner is hereby authorized to charge the large entity fee of **\$510.00** under 37 C.F.R. §§1.191(a) and 1.17(b) for filing this Appeal Brief to **Deposit Account No. 20-0668 of Texas Instruments.**

Although no other fees are believed to be due at this time, the Commissioner is hereby authorized to charge any additional fees and/or credit any overpayments to **Deposit Account No. 20-0668 of Texas Instruments.**

Respectfully submitted,

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Date: 2/5/08

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Appendix A: Claims on Appeal

1. (Previously Presented) A method for interactive television, the method comprising:

receiving a terrestrial broadcast signal comprising a video stream;

interpreting commands embedded in the video stream, said embedded commands operable to access interactive features, said embedded commands synchronized and correlated with additional Internet-based content;

receiving said Internet-based content via satellite transmission and sending transmitting information via landline transmission;

providing a digital interactive set-top box coupled to a standard television, said interactive set-top box accessing said additional Internet-based content and superimposing said content on said video stream; and

displaying said additional Internet-based content superimposed on said video stream from said traditional broadcast signal.

2. (Previously Presented) The method of claim 1, said embedding comprising embedding HTML or Java commands.

3. (Cancelled)

4. (Original) The method of claim 1, said embedding comprising embedding delimiters to define sequential video clips for storage and future display.

5. (Original) The method of claim 1, said embedding comprising embedding delimiters to define sequential video clips for storage and future display, each of said sequential video clips comprising a segment of a sporting event.

6. (Previously Presented) A method for interactive television, the method comprising:

receiving a terrestrial broadcast signal comprising a video stream;

interpreting commands embedded in the video stream, said embedded commands operable to access interactive features, said embedded commands synchronized and correlated with additional Internet-based content; said embedding comprising embedding delimiters to define sequential video clips for storage and future display, each of said sequential video clips comprising a segment of a sporting event;

storing one or more of said video clips of said selected plays;

summarizing said stored video clips with a graphic summary including coded indicators denoting types of plays;

replaying one of said video clips upon viewer selection of a corresponding said coded indicator

receiving said Internet-based content via satellite transmission and sending transmitting information via landline transmission; and

displaying said additional Internet-based content superimposed on said video stream from said traditional broadcast signal.

7. (Original) The method of claim 6, comprising selecting a fixed graphic format for viewing on a standard non-interactive television.

8. (Original) The method of claim 1, said embedding comprising embedding commands in said video stream to facilitate polling of viewers, allowing said viewers to vote on an aspect of said simultaneously displayed broadcast data.

9. (Original) The method of claim 1, said embedding comprising embedding commands in said video stream to prompt access to Internet sites offering pushed products.

10. (Original) The method of claim 1, said embedding comprising embedding commands in said video stream to prompt access to Internet sites offering pushed products selected from the group consisting of: tickets to future sporting events, travel packages, and sports apparel.

11. (Previously Presented) A method for interactive television, the method comprising:

providing a broadcast signal comprising a video stream;

embedding commands in the video stream, said embedded commands operable to access interactive features, said embedded commands synchronized and correlated with additional Internet-based content, said embedding comprising embedding commands in said video stream to prompt access to Internet sites offering pushed products selected using analysis of said viewer's habits;

providing a digital interactive set-top box coupled to a standard television, said interactive set-top box accessing said additional Internet-based content and superimposing said content on said video stream; and

displaying said additional Internet-based content superimposed on said video stream from said broadcast signal.

12. (Original) The method of claim 1, said embedding comprising embedding commands enabling a viewer to interactively complete a transaction to purchase various products by selecting an Internet generated icon on the display screen.

13. (Original) The method of claim 1, said embedding comprising embedding commands enabling a viewer to interactively complete a transaction to purchase various products and receive confirmation of said transaction in real-time on a display screen.

14. (Original) The method of claim 1, said embedding comprising embedding commands utilizing streaming data from said Internet or television broadcast to further enhance the viewing experience by continuously superimposing interactive data in various locations on said broadcast video.

15. (Original) The method of claim 1, said embedding comprising embedding commands utilizing streaming data comprising a selected personalized portfolio of stocks, the ticker for said selected portfolio being taken from market data embedded in said video stream and presented and updated in a banner or window on said display screen.

16. (Original) The method of claim 1, comprising editing interactive data selected from a group consisting of sports teams and portfolio stocks from a screen menu in real-time.

17. (Previously Presented) A method for interactive television, the method comprising:

receiving a terrestrial broadcast signal comprising a video stream;

interpreting commands embedded in the video stream, said embedded commands operable to access interactive features, said embedded commands synchronized and correlated with additional Internet-based content;

receiving said Internet-based content via satellite transmission and sending transmitting information via landline transmission;

displaying said additional Internet-based content superimposed on said video stream from said traditional broadcast signal; and

providing taskbars displaying various accounts in the home.

18. (Previously Presented) An interactive television system, comprising:

- a broadcast video receiver for receiving video data from a video provider service via terrestrial broadcast transmission;
- a digital interactive set-top box coupled to a standard television, said interactive set-top box accessing said additional Internet-based content and superimposing said content on said video data; said digital interactive set-top box comprising:
 - an internet browser providing bi-directional access to internet content, said internet browser receiving said internet content via satellite transmission, and said internet browser sending said internet content via landline transmission;
 - a graphics processor capable of receiving said broadcast video content and said internet content and providing combined video data comprised of both broadcast video content and internet content; and
 - a viewer interface interpreting viewer input and sending corresponding data content through said internet browser to a third party; and
 - a display in communication with said graphics processor for displaying said combined video data.

19-23. (Cancelled)

24. (Previously Presented) The method of claim 5, comprising:
storing one or more of said video clips of said selected plays;
summarizing said stored video clips with a graphic summary including coded
indicators denoting types of plays; and
replaying one of said video clips upon viewer selection of a corresponding said coded
indicator.

25. (Previously Presented) The method of claim 1, comprising providing taskbars
displaying various accounts in the home.

Appendix B: Evidence

Evidence Appendix

No evidence was submitted pursuant to 37 C.F.R. §§ 1.130, 1.131, or 1.132, and no other evidence was entered by the Examiner and relied upon by Appellants in the Appeal.

Appendix C: Related Proceedings

The Appellants, the undersigned Attorney for Appellants, and the Assignees know of no decisions rendered by a court or the Board in any proceeding related to the prior Appeal Brief filed by Appellants on January 19, 2007. The Appellants, the undersigned Attorney for Appellants, and the Assignees no of no other applications on appeal that may directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.